

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042.
Washington, DC 20529

identifying data deleted to
prevent ~~in~~ warrant
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B5

MAR 25 2005

FILE:

LIN 03 229 50170

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software and consultancy and development company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 5, 2002. The proffered wage as stated on the Form ETA 750 is \$70,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on March 29, 1999, to have a gross annual income of \$1.5 million, net loss of \$5,000, and to currently employ 35 workers. In support of the petition, the petitioner submitted its 2001 and 2002 Forms 1120, U.S. Corporation Income Tax Returns. The 2002 return, which covers the priority date, includes the following information:

Net income	(\$96,942)
Current Assets	\$28,131
Current Liabilities	\$26,721
Net current assets	\$1,410

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 22, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide audited financial statements, complete bank records, and/or personnel records to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested, if applicable, evidence of any wages paid to the beneficiary by the petitioner. Finally, the director noted that the petitioner

had filed petitions for other beneficiaries and requested a list of pending petitions and the proffered wages associated with those petitions.

In response, the petitioner submitted non-precedent decisions issued by this office concluding that an employer had demonstrated an ability to pay despite showing a net loss on its income tax returns for various reasons, including paying down a debt, an uncharacteristically unprofitable year, and having over 100 employees. The most recent of these cases is dated 1996. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. The petitioner also submitted its audited financial statements for 2002 that include the following information:

Net income	(\$37,910)
Current Assets	\$244,661
Current Liabilities	\$157,680
Net current assets	\$86,981

The petitioner also submitted quarterly statements of deposits and filings. Counsel argues that 2002 was an uncharacteristic year and that the accounts receivable as of December 2002, \$203,184, were sufficient to cover the proffered wage. The petitioner provided a list of seven Form I-140 immigrant petitions it had filed that were still pending, listing the annual proffered wage for four of them as \$70,000, for two of them as \$63,200, and for the last one as \$65,000.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. In reaching this determination, the director noted that the petitioner had not demonstrated that 2002 was an uncharacteristically unprofitable year, that an entity's income cannot be considered without equal consideration of its expenses and the number of other immigrant petitions filed by the petitioner.

On appeal, counsel asserts that the petitioner's gross income and accounts receivable establish its ability to pay the proffered wage. The petitioner resubmits its 2002 audited financial statements.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v.*

Sava, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, counsel's argument that the petitioner's accounts receivable should have been considered in the determination of the ability to pay the proffered wage without consideration of the petitioner's current liabilities. CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The record, however, contains conflicting numbers for net current assets. Specifically, as stated above, the petitioner's tax return, prepared by [REDACTED] PA, lists \$28,131 in current assets with no trade notes or accounts receivable. The same form lists \$26,721 in current liabilities with no accounts payable. The petitioner's audited financial statements, prepared by [REDACTED] and [REDACTED] PA, however, list \$244,661 in current assets and \$157,680 in current liabilities. These numbers include substantial accounts receivable and payable.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record contains no explanations for the significantly different numbers.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a net loss. The petitioner has not resolved the inconsistencies between the net current assets on its 2002 tax return, schedule L, and its audited financial statements. Thus, we cannot rely on those numbers. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

Finally, the petitioner has not resolved the issue, raised by the director in his request for additional evidence and in his final decision, regarding the other petitions the petitioner has pending. In addition to the seven Form I-140 immigrant petitions it concedes are pending, we note that the petitioner has filed a total of 229 immigrant and nonimmigrant petitions since 2000, when it only employs 26 employees according to its 2003 first quarter statement. While an employer's ability to pay the proffered wage may not be an issue before CIS in adjudicating nonimmigrant petitions, the instant petition is an immigrant petition and the petitioner's ability to pay is at issue. The large number of nonimmigrant and immigrant petitions does not suggest that the petitioner has the available funds to pay the beneficiary the proffered wage.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002 and continuing. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.